Georgia Public Service Commission

244 WASHINGTON STREET, S.W.
ATLANTA, GEORGIA 30334-5701

(404) 656-4501
(800) 282-5813

FAX: (404) 656-2341
www.psc.state.ga.us

Docket No. 18948-U

In Re: CompSouth's Petition for a Ruling Regarding the Need for Public Review and Approval by the Commission of the Telecommunications Service Agreements Between BellSouth Telecommunications, Inc. and Dialogica Communications, Inc., CI2, and ABC Telecom

ORDER GRANTING PETITION AND SETTING FORTH PROCEDURE FOR THE FILING OF COMMERCIAL AGREEMENTS

On May 25, 2004, Competitive Carriers of the Southeast ("CompSouth") filed with the Georgia Public Service Commission ("Commission") a Petition for expedited ruling regarding the filing of BellSouth 's wholesale local phone service agreements ("Petition"). In its Petition CompSouth requested that the Commission issue a declaratory ruling that makes the following determinations:

> (1) BellSouth Telecommunications, Inc. ("BellSouth") and/or Dialogica Communications, Inc. ("Dialogica"), CI^2, and ABC Telecom, are required to file for review and approval any agreements between them concerning resale, interconnection and/or Unbundled Network Elements ("UNE") including, but not limited to the following: the April 29, 2004 "commercial agreements" between BellSouth and Dialogica, and CI^2; and the May 4, 2004 "commercial agreement" between BellSouth and ABC Telecom; and
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> (2) Under the [Federal Telecommunications Act of 1996], the Commission has authority over these agreements, and in order to comply with the requirements of the Act, §§ 252(a)(1) and 252(e)(1), the BellSouth Agreements and any other similar agreements must be filed with the Commission so that the Commission can review and approve or reject the agreements.

(CompSouth Petition, pp. 1-2).

CompSouth explained that its use of the term "commercial agreement" included "the full content of any understandings, oral agreements, or side agreements that may have a bearing on such agreements . . . and any other such agreements concerning resale, interconnection or UNE." *Id.* at fn. 1. BellSouth Telecommunications, Inc. ("BellSouth") filed its Response to this Petition on June 3, 2004. A Reply to BellSouth's Response was filed with the Commission on behalf of CompSouth on June 23, 2004.

I. JURISDICTION

Under the Federal Telecommunications Act of 1996 ("Federal Act"), any interconnection agreement adopted by negotiation or arbitration must be submitted for approval to the Commission. 47 U.S.C. 252(e)(1). Section 252(e) sets forth the grounds upon which the Commission may reject a negotiated or arbitrated interconnection agreement. In addition to its jurisdiction of this matter pursuant to the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (State Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

II. DISCUSSION

A. Pleadings of Parties

1. CompSouth's Petition

CompSouth attached to its petition a copy of two BellSouth press releases in which BellSouth announced that it had entered into "long-term commercial agreements" with wholesale carriers including Dialogica Communications, Inc., International Telnet, , CI[2], ABC Telecom, INET, KingTel and WebShoppe for the provisioning of wholesale local phone services throughout the nine-state BellSouth region in the Southeast. (Petition, Exhibits A and B). CompSouth alleged that BellSouth had informed the Florida Public Service Commission on May 5, 2004, that it would not file these commercial agreements with that state commission. *Id.* at 4. CompSouth further alleged that in a carrier notification letter BellSouth indicated that it would allow public inspection of the agreements, provided however, that the agreements would not include the customer name, could not be recorded or reproduced in any manner and would only remain available for inspection during the term of the agreement. *Id.*

In support of the relief that it seeks, CompSouth relied upon the requirement in the Federal Act that interconnection agreements adopted by negotiation be submitted to the state commission for approval under Section 252. *Id.* at 5. Section 252(e)(2) authorizes state commissions to reject the negotiated agreement if it finds that the agreement (or portion thereof) discriminates against telecommunication carriers not party to the agreement or upon a finding that implementation of such agreement would not be consistent with the public interest, convenience and necessity. CompSouth then cited to *Qwest NAL,*[1] in which the Federal Communications Commission ("FCC") stated that ". . . any 'agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way,

[1] *Qwest Corp. Apparent Liability for Forfeiture,* File No. EB-03-0III-0263, ¶ 11 (rel. March 12, 2004) (FCC 04-57) ("*Qwest NAL*").

reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).'" *Id.* at 5.

CompSouth argued as well that Section 271 mandates the filing of these agreements because this section requires BellSouth to provide access to interconnection. (Petition, p. 7). CompSouth stated that the commercial agreements defined terms and conditions under which the competitive local exchange carriers ("CLECs") accessed BellSouth's network and provided them with interconnection and access to UNEs and UNE combinations. *Id.* CompSouth argued that because the prior agreements between the parties that included these terms and conditions were submitted to the state commissions for approval, these agreements should be filed as well. *Id.*

CompSouth also relied upon the decisions of numerous state commissions that have required BellSouth to file the agreements. CompSouth concluded that not filing the agreements would result in discrimination. *Id.* at 11.

2. BellSouth's Response

In its June 3, 2004, Response to CompSouth's Petition, BellSouth argued that the petition should be denied on both policy and legal grounds. BellSouth argued that regulation would chill the negotiations between the parties. (Response, p. 2). BellSouth speculated that parties would be less willing to enter into agreements if those agreements were subject to Section 252(e) of the Federal Act. *Id.* at 3.

BellSouth also pointed out that the commercial agreements are filed with the FCC and "available in appropriate files at a central location in Atlanta and will make copies readily accessible to FCC staff and members of the public upon reasonable request." *Id.* at 4. Pursuant to 47 U.S.C. § 211, BellSouth contended that any carrier can raise objections to the rates at the FCC. *Id.* at 5. BellSouth argued that approval by the Commission is not necessary to avoid discrimination once a finding of no impairment is made. *Id.* at 5-6.

BellSouth also argued that commercial agreements are not subject to Section 252 because obligations under this section only apply to agreements requested pursuant to Section 251. *Id.* at 7. A request under Section 251 must be for resale, UNEs or interconnection offered by Section 251. *Id.* at 8. BellSouth cited to *United States Telecom Ass'n v. FCC*, Nos. 1012, *et al.* (D.C. Cir. Mar. 2, 2004) (*"USTA II"*) for the proposition that the FCC has the sole responsibility for determining Section 251 elements. *Id.* BellSouth next argued that in its *Qwest ICA Order*[2] the FCC has limited Section 252(a)(1) filing requirements to agreements that contain ongoing obligations relating to Section 251(b) or (c). *Id.* at 10. BellSouth also contended that the *Triennial Review Order*[3] supports its position. *Id.* at 11. Finally, BellSouth argued that the state commission orders that have required the commercial agreements to be filed are incorrect. *Id.*

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[2] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) (*"Qwest ICA Order"*).

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 (2003)

3. CompSouth Reply

In reply, CompSouth raised four reasons for why BellSouth's legal argument is incorrect. First, a request for interconnection under Section 251 "is not limited to services or network elements that the incumbent local exchange carrier ("ILEC") must provide only because of legal obligations set forth in section 251." (Reply, p. 3). Second, Section 252(e) refers to "any interconnection agreement" without any limitation for agreements addressing Section 251 issues. *Id.* CompSouth pointed out that under Section 252(a)(1), an agreement that protects against discrimination may be approved even if it does not comply with Section 251. *Id.* at 4. The third ground raised by CompSouth is that Section 271 ties BellSouth's obligation under the competitive checklist to its providing access through an interconnection agreement. *Id.* at 5. Finally, CompSouth argued that *Qwest NAL* requires that the agreements must be filed. *Id.* at 6-10.

B. Conclusions of Law

The Commission agrees with the arguments raised in CompSouth's petition. First, FCC rulings support the conclusion that the commercial agreements must be filed with state commissions. The *Qwest NAL* decision relied upon by CompSouth supports a broad construction of the requirement under Section 252 that agreements be submitted for approval by the state commissions. *Qwest NAL* at ¶ 11. Applying the filing requirement, as the FCC does in that order, to any agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation appears to cover the commercial agreements in question. The exceptions noted by the FCC to the filing requirement were narrow.

> Specifically, we found that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) do not have to be filed if the information is generally available to carriers. We stated that settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251 do not need to be filed. In addition, we found that forms completed by carriers to obtain service pursuant to terms and conditions of a underlying interconnection agreement do not constitute either an amendment to that agreement or a new interconnection agreement that must be filed under section 252. Finally, we held that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court and that do not otherwise change the terms and conditions of the underlying interconnection agreement are not themselves interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a).

(*"Triennial Review Order"*) *reversed in part on other grounds, United States Telecom Ass'n v. FCC*, Nos. 1012, *et al.* (D.C. Cir. Mar. 2, 2004).

(*Qwest NAL*, ¶ 23) (footnotes omitted).

The narrow scope of the exceptions further illustrates the FCC's generally broad construction of the term "interconnection agreement." The pleadings do not reflect that any of the exceptions to the filing requirement apply to the commercial agreements at issue in this docket.

The FCC has also indicated its position that state commissions should decide whether an agreement is an "interconnection agreement" that should be submitted for approval. "Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected . . . we decline to establish an exhaustive, all-encompassing 'interconnection agreement' standard." (Qwest ICA Order, ¶ 10) (footnote omitted). Should the FCC, at some future point, offer such a standard for what constitutes an "interconnection agreement" that must be submitted to state commissions for approval, the Commission may revisit the issue at that time.

The Commission also disagrees with BellSouth's arguments concerning whether an agreement negotiation upon request "pursuant to Section 251" as stated in Section 252(a)(1) may involve anything other than resale, UNEs or interconnection to be offered by Section 251. According to BellSouth it cannot, and therefore, the commercial agreements do not fit the description in Section 252(a) and do not have to be filed under Section 252(e).). However, a voluntarily negotiated agreement may be approved even if it does not comply with Section 251 requirements. Section 252(a)(1) makes clear that carriers may negotiate "without regard to the standards set forth" in Sections 251(b) and (c). Further, Section 252(e) provides that state commissions can reject voluntarily negotiated agreements because the agreement is discriminatory to other telephone carriers, or is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A). This section does not list as a ground for rejection the failure to meet requirements of Section 251, as it does in consideration of arbitrated agreements. 47 U.S.C. § 252(e)(2)(B).

BellSouth's argument that a request "pursuant to 251" must be for the resale, UNEs or interconnection to be offered under Section 251 is inconsistent with the explicit language that voluntary negotiations of interconnection agreements may take place without regard to the requirements in Section 251(b) and (c). Moreover, as pointed out in CompSouth's Reply, a request pursuant to Section 251 is not limited to services or network elements that the ILEC must provide only because of the legal obligations of Section 251. (CompSouth Reply, p. 3). Section 251(c)(1) also requires ILECs to negotiate in good faith with requesting CLECs.

While Section 251(c)(1) links the obligation to negotiate in good faith to the fulfillment of duties in Section 251(b) and (c), it also states that the obligation is in accordance with Section 252. As stated above, Section 252(a) states that the parties may negotiate interconnection agreements without regard to the obligations in Section 251(b) and (c). It is well-established that a statute must be construed in its entirety so that each part has a sensible and intelligent effect, harmonious with the whole. *Shotz v. City of Plantation*, 344 F.3d 1161, 1173 (11th Cir. 2003). Reading the sections together indicates that an ILEC's obligation to negotiate in good faith

extends to instances in which the interconnection agreement does not meet the requirements in Sections 251 (b) and (c). Therefore, the Commission finds reasonable CompSouth's analysis that a request "pursuant to 251" is not limited to services or UNEs related solely to an ILEC's legal obligations set forth in Section 251, but rather, is "the vehicle provided by the Act that requires ILECs to negotiate *at all* with CLECs . . ." (CompSouth Reply, p. 3) (emphasis in original).

Section 252(a)(1)'s requirement that even those interconnection agreements negotiated prior to the Federal Act must be filed with state commissions further supports the conclusion that BellSouth has taken an overly narrow position on the types of agreements that must be submitted. It is illogical to conclude on the one hand that the filing requirement pertains to only those negotiated agreements for the resale, UNEs or interconnection to be offered under Section 251, while on the other hand acknowledging that interconnection agreements entered into prior to the existence of that code section must also be filed. It is apparent both that voluntarily negotiated interconnection agreements are not required to meet the standards set forth in Section 251, and that state commissions have the obligation to ensure that voluntarily negotiated agreements do not result in discrimination and are not contrary to the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A). To meet its statutory obligations, state commissions must have the ability to review and act upon voluntarily negotiated interconnection agreements.

The Commission also notes that a number of other states have required ILECs to submit commercial agreements for approval. The California Public Utilities Commission ("CPUC") required SBC Communications, Inc. ("SBC") and Sage Telecom, Inc. to file their commercial agreement with the CPUC. (Letter from Randolph L. Wu, State of California Public Utilities Commission, to SBC (April 21, 2004)). Also, the Michigan Public Service Commission and the Public Utilities Commission of Texas have ordered commercial agreements to be filed with the utility commissions for approval.[4] While the Commission is not bound by the decisions of other states, the Commission agrees with the conclusions reached by these state commissions. In addition to being consistent with the Federal Act, the filing for approval of interconnection agreements with state commissions assists in preventing discrimination against carriers not party to the agreement.

The State Act also requires rates, terms, and conditions for such interconnection services to be filed with the Commission. O.C.G.A. § 46-5-164(b). Review of the interconnection agreements is necessary to protect against the unreasonable discrimination between providers that is prohibited by the State Act. *Id.* The Commission concludes that BellSouth should be required to submit for approval their commercial agreements with CLECs.

C. Procedure

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[4] *Order*, Michigan Public Service Commission Case No. U-14121, (April 28, 2004); *Order Directing SBC and SAGE To Provide Agreement*, Public Utility Commission of Texas Docket No. 29644 (May 13, 2004).

At its September 7, 2004 Administrative Session, the Commission directed the Staff to recommend a procedure for the filing of the commercial agreements. The Staff recommended that BellSouth be required to file the agreements in accordance with the Commission's Third Amended Procedures for Commission Review of Negotiated Interconnection Agreements ("Third Amended Procedures"). The Staff noted in its recommendation that BellSouth had indicated it would assert that the names of the companies with which it had entered into the agreements were trade secret. The Staff recommended that BellSouth be permitted to file redacted copies of each agreement pursuant to the Third Amended Procedures, and one non-redacted version under protective seal in accordance with Commission Rule 515-3-1-.11. In asserting trade secret protection, BellSouth should be obligated to "provide in writing the legal and factual basis for its assertion that the protected information is a trade secret and should not be disclosed." Commission Rule 515-3-1-.11(1)(c). The designation of filed information as trade secret will not prevent any party from petitioning under the Commission's trade secret rule to either challenge the trade secret nature of the information or for access to the information claimed trade secret.

Consistent with the Commission's procedures for approval of negotiated interconnection agreements, Staff recommended that BellSouth should file three copies of each agreement with the Commission. If, after 30 days, neither the Staff nor any other party objects to the agreement, the Staff will place the agreement on the Telecommunications Committee agenda for approval

The Commission adopted the Staff's recommendation.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the commercial agreements identified in CompSouth's petition should be filed with the Commission in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that the commercial agreements identified in CompSouth's petition shall be filed with the Commission.

ORDERED FURTHER, that BellSouth shall file the commercial agreements in accordance with the Third Amended Procedures for Commission Review of Negotiated Interconnection Agreements. BellSouth may file redacted copies of each agreement pursuant to the Third Amended Procedures, along with one non-redacted version in accordance with the Commission's Trade Secret Rule, 515-3-1-.11. In asserting trade secret protection, BellSouth shall be obligated to "provide in writing the legal and factual basis for its assertion that the protected information is a trade secret and should not be disclosed" in accord with Commission Rule 515-3-1-.11(1)(c). The designation of filed information as trade secret will not prevent any party from petitioning under the Commission's trade secret rule to either challenge the trade secret nature of the information or for access to the information claimed trade secret.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 21st day of September, 2004.

Reece McAlister
Executive Secretary

10-14-04
Date

H. Doug Everett
Chairman

10-14-04
Date